INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	2
A. Safe Harbor	3
B. Prior proceedings	4
C. Present proceedings	5
Argument	8
Conclusion	24

CITATIONS

Cases:

Adams v. *United States*, 319 U. S. 312	22
Alabama Power Co. v. *F.P.C.*, 128 F. 2d 280	19
Re Consolidated Gas Electric Light and Power Company of Baltimore, 61 P.U.R. (N.S.) 94	6
Re Consolidated Gas Electric Light and Power Company of Baltimore, 67 P.U.R. (N.S.) 144	6
Edward's Lessee v. *Darby*, 12 Wheat. 206	22
F.P.C. v. *Hope Natural Gas Co.*, 320 U. S. 591	19
Jersey Central Co. v. *F.P.C.*, 319 U. S. 61	12
National Labor Relations Board v. *Hearst Publications*, 322 U. S. 111	15
Niagara Falls Power Co. v. *F.P.C.*, 137 F. 2d 787, certiorari denied, 320 U. S. 792	11, 19
Norwegian Nitrogen Products Co. v. *United States*, 288 U. S. 295	22
Pennsylvania Gas Co. v. *Public Service Commission*, 252 U. S. 23	15
Pennsylvania Public Utility Commission v. *F.P.C.* (C.A.D.C.) No. 10239	6
Pennsylvania Water & Power Co. v. *F.P.C.* (C.A.D.C.) Nos. 10236, 10531	6
Re Pennsylvania Water & Power Company, F.P.C. Opinions Nos. 173, 173a	6
Prudential Insurance Co. v. *Benjamin*, 328 U. S. 408	14
Public Service Commission v. *Attleboro Steam & Electric Co.*, 273 U. S. 83	12
Rochester Telephone Corp. v. *United States*, 307 U. S. 125	15
Re Safe Harbor Water Power Corporation, 2 F.P.C. 182, 34 P.U.R. (N.S.) 236	5

Cases—Continued

	Page
Safe Harbor v. *F.P.C.*, 124 F. 2d 800, certiorari denied, 316 U. S. 663	5, 11, 15
Safe Harbor v. *United States*, 37 F. Supp. 9, appeal dismissed, 313 U. S. 546	11
United States v. *American Trucking Assns., Inc.*, 310 U. S. 534	22

Statutes:

Federal Power Act (41 Stat. 1063, as amended by Title II of the Public Utility Holding Company Act of August 26, 1935, c. 687, 49 Stat. 803, 838, 16 U. S. C. 791a, *et seq.*):	
Part I	9
Section 3(13)	18, 19, 20, 21, 23
Section 10(d)	22
Section 14	18
Section 20	9, 12, 14, 15, 18, 19
Section 28	23
Part II	9
Section 201(a)	11
Section 201(b)	9
Section 201(e)	9
Section 201(f)	10
Section 205	14, 18
Section 206	14
Section 206(a)	18
Part III	12
Section 305(a)	10, 11
Section 313(b)	15
41 Stat. 1063	21

Miscellaneous:

Benton, *Jurisdiction of the Federal Power Commission and of State Agencies in the Regulation of the Electric Power and Natural Gas Industries*, 14 Geo. Wash. L. Rev. 53, 78	15
18 C. F. R. (1949 ed.) 35.20, 35.3 (Commission's Rules and Regulations)	11
First Annual Report to Congress, H. Doc. No. 242, 67th Cong., 2d sess., pp. 10-11, 57, 58	21, 22
Hatfield, *Modern Accounting*, (1915), pp. 290-291	21
Hearings before the House Committee on Water Power, 65th Cong., 2d sess., pp. 4, 5, 34-35, 41, 42-43	21, 22
Hearings before the Senate Committee on Interstate Commerce, 74th Cong., 1st sess. on S. 1725, pp. 233-234	11

Miscellaneous—Continued

Page

H. Rep. No. 1318, 74th Cong., 1st sess., pp. 7, 24, 31 . . 11, 12, 22
H. Rep. No. 1903, 74th Cong., 1st sess., pp. 56 and 75 . . . 11
Mason, *Principles of Public-Utility Depreciation* (1937), p. 104 21
May, *Twenty-Five Years of Accounting Responsibility* (1936), p. 164 21
S. Rep. No. 621, 74th Cong., 1st sess., p. 17 12

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 709

SAFE HARBOR WATER POWER CORPORATION,
PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Federal Power Commission (R. VI 2727-2795) [1] is reported at 5 F. P. C. 221 and 66 P.U.R.(N.S.) 212. The opinion of the Court of Appeals for the Third Circuit (R. XI 4565-4601) is reported at 179 F. 2d 179.

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[1] Since the printed record is voluminous, consisting of eleven volumes, we shall cite the volume (in roman numerals) as well as the page.

JURISDICTION

The judgment of the Court of Appeals was entered on December 30, 1949 (R. XI 4602). The petition for a writ of certiorari was filed on March 28, 1950. The jurisdiction of this Court is invoked under Section 313(b) of the Federal Power Act and under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the interstate wholesale rate for electric energy charged by petitioner, which owns and operates facilities for the transmission and sale for resale of electric energy in interstate commerce and holds a license under Part I of the Federal Power Act, is, in the circumstances of this case, regulable by the Federal Power Commission under the rate regulation provisions of both Part I and Part II of the Act.

STATUTE INVOLVED

The pertinent provisions of the Federal Power Act (Title II of the Public Utility Act of 1935, c. 687, 49 Stat. 803, 838, 16 U. S. C. 791a, *et seq.*) appear in the pamphlet copy of the Act submitted with this brief.

STATEMENT

On February 3, 1947, Safe Harbor Water Power Corporation petitioned the Court of Appeals for the Third Circuit to review the Federal Power Commission's order of November 4, 1946 (R. XI 4478-4486), in which the Commission had found that Safe Harbor's interstate wholesale rate for electric

energy was excessive and had required a reduction so as to yield a 5% return after allowance for all operating expenses, including taxes and depreciation. This reduction on the basis of 1943 operations amounted to $627,551 (R. VI 2727-2804). The Court of Appeals affirmed the Commission's order (R. XI 4565-4601). The pertinent facts may be summarized as follows:

A. *Safe Harbor:* Safe Harbor is a Pennsylvania corporation which owns and operates a large hydroelectric project, consisting of a dam, powerhouse and transmission facilities, located on the Susquehanna River near Lancaster, Pennsylvania, under a 50-year license issued in 1930 by the Commission (R. I 28, 29, 226). Consolidated Gas Electric Light and Power Company of Baltimore (Consolidated) owns all of Safe Harbor's non-voting capital stock and 50% of its voting capital stock; the remaining 50% of the voting capital stock is owned by Pennsylvania Water & Power Company (Penn Water) (R. I 35-36, 228).

Under a contract made in 1931 and expiring in 1980, Safe Harbor sells its entire output to its parent companies, two-thirds to Consolidated and one-third to Penn Water (R. I 232). In return, petitioner receives annual payments in amounts determined by a formula designed to provide it with a fixed rate of return on investment, after defraying its operating expenses, including its taxes and an allowance for depreciation (R. I 233). These pay-

ments are independent of the amount of power and energy delivered, and regardless of any contingency that may arise never fall below the amount required to pay bond interest and sinking-fund charges in addition to operating expenses (R. I 233).[2]

The electric power resources of Safe Harbor, Consolidated and Penn Water are tied together, coordinated and operated as a regional, interconnected and integrated power-supply system serving Baltimore, Maryland, other areas in Maryland and Pennsylvania, the District of Columbia, and the Pennsylvania Railroad's electrification requirements for its main line south of Perryville, Maryland, to Washington, D. C., and generally west of Thorndale, Pennsylvania, to Harrisburg, Pennsylvania (R. I 227-228, II 525). This interconnected system is so operated as to obtain its supply of power and energy at the lowest over-all cost and the output of each generating facility is utilized at such times and in such amounts as to produce economy of operation and reliability of service (R. I 40, 230-231).

B. *Prior Proceedings:* The Commission, on its own motion, instituted its first rate proceeding against Safe Harbor in 1937 (R. VI 2728). Follow-

[2] Safe Harbor is also a nominal party to Penn Water's contracts for the supply of electric energy to Pennsylvania Power & Light Company and Philadelphia Electric Company and to a Consolidated-Penn Water contract with the Pennsylvania Railroad, but makes no sales under these contracts (R. I 234, VIII 3479-3481).

ing hearings in 1939, the Commission issued a rate reduction order on July 11, 1940, relying exclusively on the authority of Part I of the Federal Power Act (R. VI 2728-2729). *Re Safe Harbor Water Power Corporation,* 2 FPC 182, 34 P.U.R. (N.S.) 236. The rate reduction ordered, amounting to approximately $350,000 annually, would have provided a 6% return (R. VI 2729). On review, the Court of Appeals for the Third Circuit set the Commission's order aside on the single ground that the Commission was without jurisdiction under Part I, in the absence of a finding that "the States of Pennsylvania and Maryland by their respective commissions were unable to agree on the service to be rendered by the power company or on the rates or charges of payment therefor." *Safe Harbor* v. *F.P.C.,* 124 F. 2d 800, 808. This Court denied certiorari. 316 U. S. 663.

C. *Present Proceedings:* On August 31, 1944, more than two years after termination of the first proceeding, the Federal Commission received a petition from the Maryland Public Service Commission [3] requesting it to proceed to determine the reasonable rates to be charged by Safe Harbor and

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[3] Earlier, on August 14, 1944, the Federal Commission received a joint petition from the Mayor and City Council of Baltimore, Maryland, and others, requesting it to determine "the just and reasonable wholesale rates charged for electric energy which is sold * * * in interstate commerce" to Consolidated by Safe Harbor and Penn Water for resale. (R. I 7-9, XI 4579-4581.)

Penn Water for energy sold to Consolidated (R. I 6-7, XI 4581-4582).[4]

On September 1, 1944, the Federal Commission initiated the present proceeding (R. I 2-4).[5] After extensive hearings, the Commission on November 4, 1946, issued its opinion and order (R. VI 2727-2804). After finding the States "unable to agree" on the regulation of petitioner's rate, the Commission asserted jurisdiction to regulate it under Section 20 of Part I which relates *inter alia* to rates of licensees whose power enters interstate commerce (R. VI 2740-2741, 2796-2798). The Commission also asserted jurisdiction under Section 206(a) of Part II on the ground that since petitioner owns and operates facilities for the transmission and sale

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[4] The importance of the interstate rates to Consolidated's retail rates to consumers, which were at the time under investigation by the Maryland Commission, is referred to by that Commission in its opinions in its investigation. *Re Consolidated Gas Electric Light and Power Company of Baltimore*, 61 P.U.R. (N.S.) 94, 102-103; *Re Consolidated Gas Electric Light and Power Company of Baltimore*, 67 P.U.R. (N.S.) 144, 149-150.

[5] Simultaneously, the Commission initiated a separate investigation of Penn Water's rates. On January 5, 1949, the Commission issued an order directing Penn Water to reduce its rates by about $2,000,000 per year. *Re Pennsylvania Water & Power Company*, FPC Opinions Nos. 173, 173a (rehearing denied). Petitions to review these orders are now pending in the United States Court of Appeals for the District of Columbia Circuit. *Pennsylvania Water & Power Co.* v. *F.P.C.* (C.A.D.C.) No. 10236; *Pennsylvania Public Utility Commission* v. *F.P.C.* (C.A.D.C.) No. 10239; see, also, *Pennsylvania Water & Power Co.* v. *F.P.C.* (C.A.D.C.) No. 10531 (petition to review Commission's order of October 27, 1949, prescribing rate schedules).

at wholesale of electric energy in interstate commerce, it is a "public utility" within the meaning of that Part (R. VI 2742-2746, 2798-2799). The Commission further found that Safe Harbor's status as a licensee under Part I does not exempt it from regulation under Part II and that no conflict results from regulation under both Parts I and II (R. VI 2746-2759).

In fixing the rate, the Commission found the actual legitimate original cost of petitioner's property to be $30,141,176 for the year 1943 (R. VI 2762, 2801-2802). The Commission added $220,000 for working capital and deducted the reserve for depreciation per books for 1943 in the amount of $1,575,674 (R. VI 2801, 2802).[6] On the resulting rate base of $28,785,502, the Commission allowed an annual return of 5% (or a return of $1,439,275), which it found to be "fair and reasonable" (R. VI 2783, 2784, 2804). Based on these findings, the Commission, using 1943 as illustrative, concluded that Safe Harbor's rate was excessive by $627,551 (R. VI 2802-2803).

After the Commission denied its petition for rehearing and stay (R. VI 2805-2868, 2869-2870), petitioner sought review of the Commission's order in

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[6] Although the Commission also found that petitioner's depreciation reserve was deficient by about $3,000,000, it did not deduct the full amount of accrued depreciation because only the existing reserve had been recouped in rates (R. VI 2780, 2782).

the Court of Appeals under Section 313(b) of the Act (R. XI 4478-4486). The court held that, although petitioner is a licensee under Part I, it also is a public utility under Part II since it owns and operates jurisdictional facilities and that its rate is accordingly subject to regulation by the Commission under Part II (R. XI 4570-4572). The court went on to approve the Commission's finding that Maryland and Pennsylvania were "unable to agree," and held that this finding authorized the Commission to regulate petitioner's wholesale interstate rate as a licensee under Section 20 of Part I (R. XI 4576, 4578-4585). The court further upheld the Commission's determination that it had jurisdiction to regulate the rate under both Parts, finding that the formulae for rate regulation provided in Parts I and II were "substantially identical" (R. XI 4574), and so treating it as unnecessary to resolve the alleged conflicts resulting from regulation under both Parts (R. XI 4574). The court concluded that the rate reduction ordered by the Commission was supported by substantial evidence, adding "were we reviewing the matter *de novo* we would reach the same conclusions as those expressed by the Commission" (R. XI 4600, 4585-4601). Accordingly, it affirmed the order of the Commission (R. XI 4601).

ARGUMENT

Petitioner does not contest the Commission's finding, upheld by the court below, that Safe Harbor's sales of electric energy are at wholesale in inter-

state commerce;[7] nor does it deny that if provisions of Part II of the Federal Power Act relating to public utilities are applicable, its rate was properly reduced. Petitioner's basic contention is that Parts I and II of the Act are mutually exclusive, that it is a "licensee" under the original Federal Water Power Act (designated, as amended, as Part I of the Federal Power Act in Title II of the Public Utility Act of 1935), and hence that it cannot be a "public utility" subject to the rate regulation provisions of Part II. This claim is premised primarily on the contentions (1) that the language of Part II exempts all licensees from regulation thereunder, and (2) that the rate regulation provisions of Part II are in irreconcilable conflict with those of Section 20. Both of these contentions are without merit on the facts of this case; there is no conflict of decisions; and, notwithstanding petitioner's contentions, the record shows that, in view of the particular circumstances here involved, no questions of general importance are presented. Accordingly, we submit, further review by this Court is not warranted.

1. (a). Section 201(e) of Part II defines a "public utility" as any person who owns or operates "facilities subject to the jurisdiction of the Commission," and the effect of Section 201(b) is to subject to Commission jurisdiction all facilities for the

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[7] The court stated: "It cannot be disputed that Safe Harbor makes such jurisdictional sales and the Commission has so found on very adequate evidence" (R. XI 4570).

transmission or sale at wholesale (*i.e.*, for resale) of electric energy in interstate commerce. Since petitioner unquestionably is the owner and operator of facilities used for the transmission and sale of electric energy at wholesale in interstate commerce, it falls squarely within Section 201's definition of a "public utility" and hence within the affirmative grant of jurisdiction to the Commission.

In addition, petitioner is not within, nor does it claim exemption under, any of the express exceptions set out in Section 201(f). Moreover, there is no basis for petitioner's suggestion that such an exception should be implied exempting licensees such as petitioner from coverage under Part II (Pet. 10). It is clear from the legislative history of Part II that Congress recognized that its definition of public utilities embraced some licensees and that it intended such licensees to be regulated as public utilities as well. Thus, the House Committee on Interstate and Foreign Commerce deleted the word "licensees" in Section 305(a)'s prohibition against personal profit by officials and left that prohibition directed solely against public utilities, because it understood that licensees owning or operating Part II jurisdictional facilities would be regulated as public utilities. The Committee commented:

> The Senate bill includes licensees within the provisions of this section, but inasmuch as such licensees when interstate operating public-utility companies will be subject to the provisions

> of the section in any event, licensees have been omitted from the bill as reported, because of the lack of public interest in those companies which are not public utilities.[8]

Dozier A. DeVane, Solicitor of the Federal Power Commission and one of the draftsmen of Part II, evidenced the same understanding. He stated at the hearings on the proposed legislation that "title II (Parts II and III of the Act) deals with operating companies" and that "among the operating companies are those companies that now have licenses from the Federal Power Commission under the Federal Water Power Act." Hearings before the Senate Committee on Interstate Commerce, 74th Cong., 1st sess., on S. 1725, pp. 233-234.[9]

(b). The statement in Section 201(a), that federal regulation was to extend "to those matters which are not subject to regulation by the States,"

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[8] H. Rep. No. 1318, 74th Cong., 1st sess., p. 31. The conference report on the bill and the Act as passed incorporated the House Committee's change. H. Rep. No. 1903, 74th Cong., 1st sess., pp. 56, 75; Section 305(a).

[9] In the first *Safe Harbor* case, petitioner conceded before the Commission "that the Commission has rate making powers under Part 2 of the Act" over the petitioner (R. V 2495, 2496). Further, the court below in the earlier case quoted the statement of the district court that "Part II, as added in 1935, gives the Commission jurisdiction over the transmission and sale of electricity at wholesale in interstate commerce, whether or not by licensees." *Safe Harbor* v. *F.P.C.*, 124 F. 2d 800, 804, fn. 4 (C. A. 3), certiorari denied, 316 U. S. 663; *Safe Harbor* v. *United States*, 37 F. Supp. 9, 10 (E.D. Pa.), appeal dismissed, 313 U. S. 546; see, also, *Niagara Falls Power Co.* v. *F.P.C.*, 137 F. 2d 787, 795 (C. A. 2), certiorari denied, 320 U. S. 792; 18 C.F.R. (1949 ed.) 35.20, 35.3 (Commission's Rules and Regulations).

does not advance petitioner's position. This language, we submit, was not directed at exempting licensees, but rather was another expression of the Congressional purpose in enacting Parts II and III of complementing state regulation by closing the regulatory gap revealed by *Public Service Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83. See S. Rep. No. 621, 74th Cong., 1st sess., p. 17; H. Rep. No. 1318, 74th Cong., 1st sess., p. 7; *Jersey Central Co.* v. *F.P.C.*, 319 U. S. 61, 67-68, fn. 7. As stated by the court below, "The control of rates referred to in the section is control by a single State and the language has no relation to possible joint control by two or more States * * *" (R. XI 4576). Furthermore, none of the many references to the *Attleboro* case in the legislative history suggests that the gap to be filled by the proposed legislation was anything less than the full scope of the constitutional impotence of the States. Indeed, during the entire course of the bill through Congress, not once was it suggested, as it is now by petitioner, that the gap had already been partially filled by Congress' previous enactment of Section 20.

(c). Nor is petitioner's argument aided by the fact that public utility is defined as "any person who owns or operates facilities subject to the jurisdiction of the Commission *under this Part.*" (Emphasis added.) Petitioner's contention from this language, that it cannot be a public utility inasmuch

as its facilities are subjected to Commission jurisdiction under Part I (Pet. 10), is predicated on the erroneous assumption that regulation under Parts I and II is mutually exclusive. Once it is recognized, however, that there is no statutory barrier to a company's being both a licensee and a public utility (see *supra,* pp. 10-11), it becomes plain that the purpose of the language "under this Part" is to exclude from regulation under Part II companies, including licensees, which do not own or operate facilities for the transmission or sale for resale of electric energy in interstate commerce.[10]

2. Petitioner further contends that subjecting it to regulation under both Parts I and II will result in an irreconcilable conflict between the rate regulation provisions of these Parts which petitioner urges can only be resolved by regulating it under Part I alone. These provisions are said to have two points of conflict: first, in regard to the regulatory body possessing authority to fix rates and second, as to the standards for fixing rates. The holding below that no such conflicts exist in the circumstances of this case was, we submit, sound and accordingly the difficulties, which petitioner urges preclude its being subjected to rate regulation under both Parts, are not presented in this case.

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[10] The same purpose underlies "The repeated and careful differentiation between 'licensees' and 'public utilities'" referred to by petitioner (Pet. 12). That differentiation does not indicate, as petitioner suggests, that a company could not be both a licensee and a public utility and so regulable under both Parts.

(a) Petitioner's claim of conflict as to regulatory body is grounded on a comparison of Section 20 of Part I with Part II. The language of Section 20 leaves regulation of rates for electric energy entering interstate commerce to the state commissions directly concerned if they can agree, with the Commission having rate regulatory authority only if the state commissions are unable to agree. On the other hand, Sections 205 and 206 of Part II vest unconditional authority in the Commission to regulate the rates of public utilities for transmission or sale for resale of electric energy in interstate commerce. While a conflict might exist if state cooperation subjected a licensee-public utility to the possibility of simultaneous regulation by state commissions under Section 20 and by the Commission under Part II (Pet. 10-11), no possibility of such conflict exists on the facts here, since the court below upheld the Commission's conclusion that Pennsylvania and Maryland, the States concerned, were unable to agree, and thus that in this case the Commission has authority to regulate petitioner's rates under Part I as well as Part II. The resolution of any such potential conflict between federal and state regulatory authority should, we submit, be deferred until actually presented.[11]

[11] When so presented, the Commission will urge that Section 20 as enacted in 1920 was intended not to sanction affirmatively state regulation of interstate transactions (cf. *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 429-431), but rather to permit the states to exercise whatever power they might have over interstate rates. See,

The Commission's conclusion that the States were unable to agree is supported by ample evidence and so is conclusive. Section 313(b) of the Federal Power Act; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 145-146; *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, 130-131. The record shows that from late 1941 until the summer of 1944, no action was taken by the state commissions looking toward cooperative regulation, notwithstanding the fact that the Commission's order finding that Safe Harbor's rate was unreasonably high had been set aside solely on the ground that the Commission had not found that the Maryland and Pennsylvania Commissions were unable to agree. See *supra,* p. 5. Then, after the lapse of more than two years, the Maryland Commission by letter requested the Federal Commission to proceed to determine reasonable rates to be charged by Safe Harbor (R. VI 2741), *supra,* pp. 5-6. Inasmuch as the letter shows on its face that the Maryland Commission was aware that under the first *Safe*

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e.g., Pennsylvania Gas Co. v. *Public Service Commission,* 252 U.S. 23. This Court's decision in the *Attleboro* case in 1927 indicated that the states were constitutionally without power to agree to regulate wholesale interstate rates. Accordingly, the condition of Section 20 falls and the Commission has unconditional power to regulate the wholesale interstate rates of licensees. In the alternative, the Commission will suggest that to the extent that a conflict exists, Section 20 was repealed *pro tanto* by implication by the later enactment of Part II. See *Safe Harbor* v. *F.P.C.,* 124 F. 2d 800, 804 (C.A. 3), certiorari denied, 316 U.S. 663; Benton, *Jurisdiction of the Federal Power Commission and of State Agencies in the Regulation of the Electric Power and Natural Gas Industries,* 14 Geo. Wash. L. Rev. 53, 78.

Harbor decision it could regulate petitioner's rates by cooperative action with the Pennsylvania Commission, the fact that the Maryland Commission nevertheless requested the Federal Commission to regulate rates could only mean that the Maryland Commission decided against attempting such cooperation and hence that the states were "unable to agree." [12]

Moreover, the Commission's conclusion is sound even if the Maryland Commission's letter were to be read, as petitioner urges (Pet. 19), as merely indicating that no action had been taken by the state commissions looking toward cooperative rate regulation. As the court below stated (R. XI 4583):

> The Act * * * must be given a reasonable construction and one which will carry out the purpose of Congress to assure adequate and

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[12] This letter was so explained by the Maryland Commission in its brief filed below. As quoted in the court's opinion (R. XI 4584, fn. 20), the Maryland Commission, after enumerating various problems facing it in regard to cooperative regulation with the Pennsylvania Commission, flatly stated:

> Consideration of these factors impelled the decision by the Maryland Commission that it would be impossible for it to join in cooperative regulation with the Pennsylvania Commission. Accordingly Maryland Commission requested action by the Federal Power Commission.

Among the factors enumerated was that:

> Negotiations with the Pennsylvania Commission looking toward a cooperative procedure were instituted by the Maryland Commission. But little of a tangible nature was accomplished. The interests of Maryland and Pennsylvania were in conflict.

It would only serve to delay effective regulation of petitioner's rates to set aside the Commission's order solely because the Maryland Commission did not place these conclusive statements before the Commission. Cf. R. XI 4585.

> effective regulation of wholesale rates for electric energy in interstate commerce. The Commission stated, 5 F.P.C. at pp. 232-3, that if such rates continue to be too high "inaction by the States involved, after reasonable opportunity [to cooperate in regulation] may show that they are unable to agree as certainly as formal announcement of the fact." * * * We can perceive no reason why the Commission's finding that the States of Pennsylvania and Maryland are unable to cooperate for the purposes of regulation as provided by Section 20 may not properly be bottomed on a long continued failure of States to cooperate.

Adoption of petitioner's contention that "unable to agree" means "disagree" (Pet. 14), that it requires a showing of affirmative but futile attempts of the state commissions to cooperate (Pet. 20), would mean that, if either state commission simply did nothing, the entire period of the license might run without any regulation undertaken to assure the charging of reasonable rates which Congress in Section 20 made the sole lawful rates. By ignoring this and the further fact that the failure to try to agree might be due to the belief or knowledge of one state commission that agreement on the rates could not be reached, petitioner's claim would emasculate rate regulation under Section 20.

(b) Petitioner's final claim of conflict that the rate standards of Parts I and II are irreconcilable is based on a plain misreading of Part I. It con-

tends that (1) "net investment" as defined in Section 3(13) is prescribed as the rate base [13] and (2) net investment as so defined means an undepreciated rate base, thus posing a conflict with the actual legitimate cost rate base used by the Commission in determining rates under Part II (Pet. 13, 15-17; see R. XI 4575, 4588).

(i) Part I does not impose a rate-making standard different from that of Part II. In almost identical words, both Parts prescribe the customary standard: "reasonable, nondiscriminatory, and just," [14] the type which this Court has construed

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[13] Petitioner arrives at its claim for "net investment" as the Section 20 formula for rate regulation *via* the reference in that Section to "the value or values prescribed in section 14 hereof for the purposes of purchase by the United States, * * *." Section 14 (dealing with "recapture") provides that before taking possession, the United States "shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken * * *."

In so far as here pertinent, Section 3(13) defines "net investment" to mean "the actual legitimate original cost thereof * * * minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: * * * (b) aggregate credit balances of current depreciation accounts, * * *."

[14] The rate standard prescribed in Section 20 provides

"* * * the rates charged and the service rendered * * * shall be *reasonable, nondiscriminatory,* and *just* to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful * * *."

Section 206(a) of Part II provides

"Whenever, the Commission * * * shall find that any rate, charge, * * * is *unjust, unreasonable, unduly discriminatory* or preferential, the Commission shall determine the *just* and *reasonable* rate, charge * * *." See, also, Sections 205(a), (b).

to free regulatory commissions from adherence to any particular formula. *F.P.C.* v. *Hope Natural Gas Co.*, 320 U. S. 591. The basis of petitioner's claim necessarily is Section 20's indirect reference to net investment. But that reference clearly imposes net investment, not as a rate base, but as a ceiling in the fixing of rates. For it provides, "no value shall be claimed * * * or allowed * * * *in excess of* the value or values prescribed in section 14 * * *," which can here be no more than net investment. Thus, whatever rate base is used, it cannot exceed net investment. Accordingly, the sole difference as to rate base between the two Parts is that Part I restricts the rate base to one not "in excess of" net investment. Such limitation is obviously not the grant of a right to licensees.[15]

(ii) Even should net investment as defined in Section 3(13) be considered as a formula for rate

[15] Neither *Niagara Falls Power Co.* v. *F.P.C.*, 137 F. 2d 787 (C. A. 2), certiorari denied, 320 U. S. 792, nor *Alabama Power Co.* v. *F.P.C.*, 128 F. 2d 280 (C.A.D.C.), supports petitioner's claim to a higher rate base than here used (Pet. 15-17). Both the *Niagara* and *Alabama* cases were decided prior to the *Hope* case. Moreover, in the *Niagara* case, the Second Circuit in its discussion of rate base used "net investment" and legitimate cost interchangeably; and its reference to Section 20 presumably indicates that it was speaking of them in terms of a maximum. 137 F. 2d at 792-793. In addition, while the court in the *Alabama* case distinguished what it regarded as the prescribed formulae of valuation for rate regulation under Parts I and II, the court plainly regarded the Part I formula as lower, rather than higher, as petitioner implicitly suggests, than Part II's. 128 F. 2d at 293. Furthermore, it may be noted that there is nothing in either the *Niagara* or *Alabama* cases supporting petitioner's construction of Section 3(13) as prescribing an undepreciated rate base. See *infra*, pp. 19-23.

regulation under Part I, there is no conflict [16] resulting from the Commission's requirement that petitioner's depreciation reserve as shown by its books be deducted.[17] Petitioner claims that under Section 3(13) its reserve for depreciation can be deducted from its rate base only to the extent, if at all, that its income remaining after deduction of operating expenses including normal depreciation expense, has been in excess of a fair return. Since only depreciation charges in the operating section of the income statement are reflected in the reserve for depreciation, petitioner's contention in effect is that it is not this normal depreciation reserve but only a special kind of a depreciation reserve accumulated out of excessive profits which is to be deducted. Under this construction a licensee could, over the entire period of its license, be entitled to rates sufficient both to recover 100% of its capital investment and to earn a return on the full investment, including the part already recovered.

In so urging, petitioner seeks to take advantage of the changed point of view toward depreciation

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[16] The court below found it unnecessary to pass on this contention in view of its holding that net investment was not prescribed as the rate base under Part I (R. XI 4588-4589).

[17] In ordering this deduction, the Commission found that petitioner's depreciation reserve "had been accumulated from earnings in excess of a fair rate of return" (R. VI 2779, 2801), on the basis of evidence that petitioner had earned a fair return as well as depreciation accruals from the beginning of commercial operations in 1932 (see, *e.g.*, R. VII 2885-2886, 2997).

accounting between that reflected by the 1920 language of Section 3(13) and modern accounting practices. While it is customary today to deduct depreciation expense as part of operating expenses before computing net return, it was still not unusual in 1920, when the Federal Water Power Act was enacted, to determine profits without deduction for depreciation and to consider normal depreciation as coming out of "profits" instead of constituting a cost of service to be charged to operating expense. See *First Annual Report to Congress,* H. Doc. No. 242, 67th Cong., 2d sess., p. 58; Hatfield, *Modern Accounting* (1915), pp. 290-291; May, *Twenty-Five Years of Accounting Responsibility* (1936), p. 164; Mason, *Principles of Public-Utility Depreciation* (1937), p. 104. It was in light of this practice of considering depreciation expense as coming out of profits instead of operating expenses that Section 3(13) referred to the depreciation reserve as accumulated from "earnings in excess of a fair return." The testimony of Mr. O. C. Merrill (an engineer, not an accountant),[18] who assisted in the preparation of the bill which eventually became the Federal Water Power Act, makes it clear that, notwithstanding the language used,

[18] At the hearings Mr. Merrill represented the Secretaries of War, Agriculture, and Interior, who comprised the Commission under the Act as originally enacted (41 Stat. 1063). Hearings, House Committee on Water Power, 65th Cong., 2d sess., pp. 4, 5. He afterward became the Commission's first Executive Secretary. H. Doc. 242, 67th Cong., 2d sess., pp. 10-11.

(1) Section 3(13) refers to the usual, not special, depreciation charges, and (2) the provision regarding net investment was intended to assure to licensees the return of 100%, but not more, of its investment. Hearings before the House Committee on Water Power, 65th Cong., 2d sess., pp. 34-35, 41, 42-43.

Moreover, within a year after the passage of the original Act, the Commission interpreted Section 3(13) in accordance with its order here (*First Annual Report to Congress, supra,* p. 57) and has consistently followed this construction. Such long-continued administrative practice is entitled to great weight. *United States* v. *American Trucking Assns., Inc.,* 310 U. S. 534, 539; cf. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 295, 315; *Adams* v. *United States,* 319 U. S. 312, 314-315; *Edward's Lessee* v. *Darby,* 12 Wheat. 206, 210.[19]

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[19] It is also significant that in 1935 Congress substituted "net investment" for "actual legitimate investment" in Section 10(d) of Part I to clarify the basis for setting up amortization reserves. In making this substitution, Congress construed the "net investment" definition as providing for deduction of the normal depreciation reserve. The House Committee on Interstate and Foreign Commerce so explained the amendment (H. Rep. No. 1318, 74th Cong., 1st sess., p. 24):

> In subsection (d), the provision that amortization reserves are to be established out of earnings in excess of a reasonable rate of return on the investment of the project is amended by providing that the return shall be calculated upon the net investment of the licensee in the project. This is obviously the intent of the present provision and the amendment is made merely for clarification. Earnings can only be calculated fairly upon the

In these circumstances, the Commission's reading of Section 3(13) to provide for the deduction of depreciation reserve from the rate base to the extent that the company had fully earned a fair return in addition to normal depreciation expense, and its deduction of such amount of depreciation reserve here are clearly sound. There could, therefore, be no conflict in the present case between a Section 3(13) "net investment" rate base and the rate base used by the Commission.[20]

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total investment as reduced by retirement and the depreciation reserves, and not upon the unchanged original cost of the project.

[20] We have demonstrated that subjecting petitioner to rate regulation under Part II as well as Part I did not affect any of its substantive rights under Part I. There accordingly is no merit to petitioner's suggestion that such regulation violates the provision of Section 28 protecting licensees against subsequent alteration, amendment or repeal of the original Act (Pet. 10, 13).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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